

**IN ARBITRATION PROCEEDINGS
PURSUANT TO THE AGREEMENT BETWEEN THE PARTIES**

In the Matter of a Controversy	OPINION AND AWARD
between	of
CITY OF PORTLAND	Charles H. Pernal, Jr.
and	Arbitrator
PORTLAND POLICE ASSOCIATION	December 12, 2002
Re: M___ B___ - T___ Grievance	Oakland, California
PPA No. 00-22	

This Arbitration arises pursuant to the Labor Agreement (Agreement) between Portland Police Association (Union), and the City of Portland, Oregon (Employer), under which Charles H. Pernal, Jr. was selected to serve as Arbitrator and under which his Award shall be final and binding upon the parties, as defined in the Agreement.

Hearing was conducted on September 26 and October 4, 2002 at City Hall, Portland, Oregon. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. The Union and Employer filed post-hearing briefs timely postmarked on October 29, 2002, which were received, respectively, on November 1 and 2, 2002.

APPEARANCES:

On behalf of the Union:
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MacDaniel Reynolds, Esq.
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On behalf of the Employer:

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ISSUES

At hearing, the parties agreed to the submission of the following issues:

1. Did the Employer have just cause to issue Grievant a written reprimand on October 26, 2000?
2. If not, what should be the remedy?

RELEVANT SECTIONS OF THE LABOR AGREEMENT¹

ARTICLE 2 MANAGEMENT RIGHTS

2.1 The City shall retain the exclusive right to exercise the customary functions of management including, but not limited to, directing the activities of the Bureau, determining the levels of service and methods of operation including subcontracting and the introduction of new equipment; the right to hire, layoff, transfer and promote; to discipline or discharge for cause, to determine work schedules and assign work and any other such rights not specifically referred to in the Contract. Management rights, except where abridged by specific provisions of this Contract or general law, are not subject to the Grievance Procedure.

ARTICLE 20 DISCIPLINE

20.1 Disciplinary action or measures shall include only the following: written reprimand, suspension, or in lieu thereof, with the officer's concurrence, loss of vacation or non-FLSA compensatory time. Disciplinary action shall be for just cause and will be subject to the following grievance procedure. This section shall not apply to counseling and instruction. Verbal reprimands will not be used as the basis for subsequent disciplinary action unless the officer is notified at the time of reprimand, and if notified, the matter will be subject to the grievance procedure.²

ARTICLE 22 GRIEVANCE AND ARBITRATION PROCEDURE

22.5 ...The arbitrator's decision shall be final and binding, but the arbitrator shall have no power to alter, modify, amend, add to or detract from the terms of the contract. The arbitrator's decision shall be within the scope and terms of the contract and in writing.

¹ The Agreement covers the period July 12, 1999-June 30, 2002.

² This last sentence is, in practice, superfluous. However, there exists, as will be described, an extra-contractual process called "command counseling," which is not listed and is not subject to the grievance procedure.

FACTS

Preliminary Statement

On May 26, 2000,³ Officer M___ B___ T___ (Grievant) was on assigned patrol in a patrol car. She received a radio call dispatch that directed her to proceed to the site of an unknown-whether-injury car accident with possible fighting. Her route of travel within City of Portland limits required that she cross the intersection of SE 96th Avenue and Woodstock Avenue (Intersection).

The Intersection has traffic lights that control cross traffic. She crossed the Intersection with siren on and lights flashing against the red light. With all other traffic stopped in two directions so as to provide Grievant with a right of way, a Jeep Cherokee from the off ramp from I-205 collided with Grievant's patrol car in the middle of the Intersection.

On October 11, Grievant received a Letter of Official Reprimand from the Employer. This is a disciplinary action that is grievable under the Agreement.

The controversy between the parties centers on whether the Employer had just cause to issue this discipline.

Oregon Statutes, Employer Policies and Procedures, and General Orders

While not specifically set forth below, note should also be taken that it is a Class C traffic infraction for pedestrians [ORS 814.050] and drivers of vehicles [ORS 811.145] to fail to yield to emergency vehicles.

STATUTES

ORS 320.300

Exemptions from traffic laws.

(1) Subject to conditions, limitations, prohibitions and penalties established for emergency vehicle and ambulance drivers under ORS 820.320, the driver of an emergency vehicle or ambulance may do any of the following:

(b) Proceed past a red signal or stop sign.

(2) The provisions of this section:

(a) Do not relieve the driver of an emergency vehicle or ambulance from the duty to drive with due regard for the safety of all other persons.

(b) Are not a defense to the driver of an emergency vehicle or ambulance in an action brought for criminal negligence or reckless conduct.

ORS 820.320

Illegal operation of emergency vehicle or ambulance; penalty.

(1) A person commits the offense of illegal operation of an emergency vehicle or ambulance if the person is the driver of an emergency vehicle or ambulance and the person violates any of the following:

³ All dates are calendar year 2000 unless otherwise noted.

(b) The driver of an emergency vehicle or ambulance must use a visual signal with appropriate warning lights when the driver is exercising privileges granted under ORS 820.300.

(c) In addition to any required visual signal, the driver of an emergency vehicle or ambulance must make use of an audible signal meeting the requirements under ORS 820.320 when the driver is proceeding past a stop light or stop sign under privileges granted by ORS 820.300(1)(b).

(f) In proceeding past any stop light or stop sign under the privileges granted by ORS 820.300, the driver of an emergency vehicle or ambulance must slow down as may be necessary for safe operation.

EMPLOYER POLICY AND PROCEDURE

DRIVING RESPONSES (630.10)

Member Responsibilities:

a. Vehicle operation in general: ORS provides authority and warnings related to emergency vehicle operation. ORS does not relieve the driver of an emergency vehicle from the duty to drive with due regard for the safety of all other persons, nor is it a defense to the driver in an action brought for criminal negligence or reckless conduct. The driver of an emergency vehicle responding to an emergency may:

4. Proceed past a red signal or stop sign while using both visual and audible signals after ensuring the intersection is clear.

f. Code 3 response requires the continuous use of emergency lights and siren and is used for critical situations demanding emergency response (e.g. person's life in danger, crime in progress, crime with suspects present, etc.)

Injury and Non-Injury Crashes (640.50)

Members will treat all crashes as potential crime scenes. Members are encouraged to investigate crashes; however, for crashes that do not meet the investigation criteria, members will make every effort to provide assistance and information to involved persons and cite violators when feasible. Members will complete an Oregon Police Crash Report for crashes involving:

e. City of Portland owned or leased vehicles occurring within the city limits.

g. An emergency code run by the police, whether or not a police vehicle was involved.

Police Vehicle Crashes

Crashes that involve Bureau vehicles will be investigated by a Traffic member, if available, or a precinct member.

VEHICLE COLLISION REVIEW BOARD (640.52)

Collisions involving Bureau assigned vehicles will be investigated and reviewed by a panel of peers. This function will be carried out by the Collision Review Board (CRB) which meets the requirements of the City for a Fleet Accident Review Board (FARB).

The Collision Review Board

The CRB will consist of ten members, including the Loss Control manager who will serve as the chairperson. The remainder of the CRB will be comprised of representatives from the following division: Traffic, Training, Detectives, Fleet and five representatives from precinct operations. It is not mandatory that each RU be represented individually. ...

The CRB will meet monthly at a regularly set time and location. A minimum of five CRB members must be present to conduct a meeting. All collisions and damage involving Bureau assigned vehicles with another vehicle, object, or person will be reviewed, except collisions resulting from the use of techniques as defined by DIR 630.05.

The CRB served two main functions in the review of Bureau vehicle collisions:

- a. Ensure that investigations and documentation are complete.
- b. Make a recommendation for finding on all cases reviewed and submit the recommendation to the appropriate RU manager for consideration.

Collision Review Process (640.52)

Copies of all reports that are generated from a vehicle collision investigation are to be sent through channels to Police Liability Management (PLM). ...Files will be established for each case and copies distributed to the CRB for their review. If these documents are not received in their entirety, the CRB may elect to send the case back for further investigation prior to hearing the case.

The CRB will consider only the facts and circumstances of each individual case. A member's past driving history will have no bearing on the recommendation given.

PLM will notify members of the date, time and location of the CRB meeting that will be reviewing their case. Members will have an opportunity to attend the meeting when their case is reviewed. ...Members attending a CRB meeting will be given an opportunity to speak concerning the circumstances of the collision and may be asked questions by the CRB to assist in their understanding of the incident.

Upon completion of each case, the CRB will make a recommendation for finding to the member's RU manager. The recommendation for finding, along with the investigation completed by the member's supervisor, will assist in the final determination. ...

The CRB's recommendation for finding will be based on criteria established by the National Traffic Safety Council (i.e., did the driver do everything reasonable to avoid the collision?). Recommendation categories include:

- a. Preventable--i.e., the driver failed to recognize a hazardous condition or circumstance and failed to take appropriate action to maintain control of the vehicle and avoid a collision.
- b. Non-preventable--i.e., the driver did recognize a hazardous condition or circumstances and took appropriate action to maintain control of the vehicle and avoid a collision.

Members are often required to drive under circumstances that are unusual and at times extreme. The determination of preventable/nonpreventable by the CRB must be tempered by the nature and significance of the mission at hand. ...

Should the recommendation of the CRB be in conflict with initial supervisory recommendations, the CRB will submit an additional memorandum to the RU manager explaining the CRB's rationale.

Should the RU manager's final decision be in conflict with the recommendation of the CRB, a memorandum will be submitted by the RU manager to his/her branch manager, with a copy to the CRB, explaining his/her decision. ...

The CRB will not make a recommendation for specific discipline and will not track this process. However, since the ultimate outcome of collision investigations is possible disciplinary action, Bureau policies for disciplinary action will be followed.

GENERAL ORDER 317.40--USE OF BUREAU EQUIPMENT

Members shall utilize Bureau Equipment and property only for its intended purpose, in accordance with established Bureau procedures, and shall not negligently or purposely abuse, damage, destroy or lose Bureau equipment. Bureau equipment issued to members shall be maintained in proper order.

Members shall not use, remove or borrow property from the Police Bureau for other than official police business. Bureau property includes office supplies, equipment, and furnishings. Numbered equipment and furnishings will not be transferred between units without the express knowledge and permission of the responsible units. The unit transferring the property will complete a receipt showing the kind of property, City property number and the unit and person receiving the property. A copy of this receipt will be forwarded to the Division responsible for maintaining Bureau inventory records.

Members will operate Bureau vehicles in a manner that will, with regard to weather, equipment and tactical consideration, result in safe and lawful operation.

Members who have accidents attributable to their negligent operation of Bureau vehicles may be subject to discipline. "Negligent operation" is defined as the failure to use care as a reasonably prudent and careful person would use under similar circumstances, the doing of some act which a person of ordinary prudence would not have done under similar circumstances, or failing to do what a reasonably prudent person would have done under similar circumstances.

Grievant's Background

As of the date of the collision, Grievant had been a police officer for almost 2 years. The Grievant was hired by the Employer's Bureau of Police as a probationary officer on September 24, 1998. Prior to her hire by the Employer, she had received some police training as a reserve police officer outside the City of Portland. She also received formal training consisting of a one-month police academy conducted by the State of Oregon before she was hired. The Employer conducts a five-phased advanced academy training of which Grievant received three phases. Phase 1 covered one month, when an assigned coach, who sometimes drove the patrol vehicle, mentored her with respect to general code responsibilities, the process of taking calls, and positioning a vehicle for stops. Phase 2, which covered the April-October 1999 period, involved Grievant doing most of the driving, including under stressful conditions.

On October 7, 1999, still during her probationary period, Grievant received a Command Counseling arising from a preventable accident occurring on August 24, 1999. Her record shows that, while she was exiting a sallyport, she misjudged distance and hit a support pole. While this was later characterized by the Employer as a violation of GO 317.40, documents in the record more contemporaneous to the event do not make a specific connection to a GO.

The Grievant successfully passed her probationary period, which lasted from her date of hire to March 2000.

The Grievant's assignments consist of patrol duties.

The Priority 2 Call

On May 26, Grievant, who was then assigned to East Precinct, was on patrol duty north of 92nd Avenue, which was south of the Intersection at issue. C___ L___, a dispatcher from the Bureau of Emergency Communications with whom Grievant was friendly, was an Employer-approved "ride-along." Ms. L___ was receiving familiarization to police field work as part of her job requirements.

Shortly after 2:00 PM, Grievant received and acknowledged a call from dispatch that informed her that she was to proceed to the scene of an unknown-whether-injury traffic accident at which people were fighting. This constituted a Priority 2 call, which, in turn, required a Code 3 response consisting of utilizing the car's siren and flashing lights.

The location of the Priority 2 was 157th Avenue and Division Street. Grievant's intended route was to turn east on SE Woodstock, to then proceed northbound, past the Intersection of 96th and Woodstock to Division, and then to turn again to arrive at the scene of the fighting/injury. This route would result in Grievant traveling eastbound through the Intersection.

Grievant turned on the lights and siren of the patrol car and made the turn on Woodstock. She drove on the far-left lane, consistent with her training, in order to get traffic to move to the right.

When Grievant reached the Intersection, she was in the far-left lane.

The Intersection

Although configured into what might be generally described as an intersection of one-way streets, the Intersection is not one of conventional design. The Intersection consists of three streets and an off-ramp from Interstate I-205 which, by overpass, crosses relatively close to the Intersection. Recourse to schematics of the Intersection at hearing assisted immeasurably in visualizing the lane configuration of the streets and the off-ramp--far more easily than a verbal description is likely to do.

Woodstock has four regular vehicle lanes [called here Lanes 1-4 moving from left to right] going eastbound on the approach to the Intersection. Adjacent to Lane 4, and headed the same one-way direction, are two additional lanes [not given numbers here]: a bike lane and a bus lane. Lane 1 is the Lane approach taken by Grievant.

Directly on the opposite side of the Intersection, Woodstock picks up again, but now as three lanes. This is because Lane 1 is a mandatory left-turn only lane, and it is precisely lined up opposite the curb and sidewalk at the corner of 96th and Woodstock. Were a driver in Lane 1 to drive straight ahead, rather than make the mandatory left turn, the driver would hit the curb and sidewalk.

Lane 2 of Grievant's approach to the Intersection is a combination lane, with pavement arrows indicating a left turn onto 96th or straight-ahead driving across the Intersection. Lanes 3 and 4 allow only for straight-ahead driving.

To summarize up to this point, 4 vehicle lanes, a bike lane, and a bus lane at one side of the Intersection on Woodstock become squeezed into three traffic lanes for Woodstock on the opposite side of the Intersection.

There are traffic and road signs also posted across the Intersection that indicate the permitted lane directions.

Also, there is a solid line between Lanes 1 and 2 at the approach. This solid line progresses into the Intersection and, maintaining the lane width, curves left onto 96th. This is to signal to the driver in Lane 1 not to stray too far to the right when making the left turn, a maneuver which might endanger the car in Lane 2 who is making the left turn at the same time.

All the lanes of the approach have limit lines for vehicles. Additionally, the limit lines of Lanes 3-4 protrude 12 feet into the Intersection beyond the limit lines of Lanes 1-2. Lane 1 is 14 feet wide; Lanes 2-4 are each 12 feet wide.

To the right of Grievant's approach is the two-lane off-ramp from I-205 [called Lanes 5-6]. Lane 5 is 14 feet wide; Lane 6 is 18 feet wide. These Lanes curve outward at the end of the off-ramp, thus widening Lanes 5-6 to a degree. The curve of Lane 6 is more pronounced than the curve of Lane 5. Obviously, the off-ramp lanes are one-way.

Across the Intersection from the off-ramp, 96th starts as three lanes, also as a one-way street. Thus, the two lane off-ramp results in off-highway traffic becoming three lanes on 96th, assuming cars in Lanes 5-6 proceed straight ahead; or, assuming cars in Lane 6 take a right, becoming three lanes on that part of Woodstock.

On brief, the Union characterizes the Intersection as one of the largest in the City of Portland. This characterization may be accurate, but something is apparent from the above description. It is that the Intersection does not present a driver with the standard street grid.

The Collision At Issue

Grievant testified she was familiar with the Intersection, although it was not in her assigned patrol district, having gone through it about 20 times before the collision. She believed there was a high possibility of pedestrian traffic at the Intersection, given the time of day and the existence of the bus and bicycle lanes. Traffic at her approach was moderate to heavy. As she approached in Lane 1, there were no cars ahead of her, but there were cars in Lanes 2-4.

At her arrival, the traffic light was, for her, red. When she came up to the limit line of Lane 1, cars were stopped at their respective limit lines.

Grievant testified she went through a scanning process at the Lane 1 limit line, scanning the Intersection from left to right. At the Lane 1 limit line, she saw the cars at Lanes 2-4, but did not have a clear view of the off-ramp. Her lights and siren were activated. When she stopped, she looked to the right, saw that she did not have a clear view to Lanes 5 and 6. At this point, in her mind, the threat areas were those of a car coming the wrong way on 96th [coming toward her from her left] and pedestrians at the Intersection cross walks.

This was her first scan.

Grievant used her engine idle to move to a point even with the [protruded] limit lines of Lanes 3-4. When she came forward, she saw cars stopped, no pedestrians, and observed two vehicles at off ramp Lanes 5-6. Up to this point, the Intersection was clear. There being no cars on Woodstock at the other side of the Intersection, nor were there any cars to her left. When she saw the fanned out cars at the respective sides of Lanes 5-6, she concluded that, if her light were red, their signal would be green. The car in Lane 5 was fanned left, and, since it couldn't legally turn left and go the wrong way on Woodstock, she concluded this, too, revealed the fanned cars at Lanes 5 and 6 were stopped for her. She also observed there was a gap between these two cars. She made eye contact with the drivers. She concluded the drivers of the off-ramp had seen her

This was her second scan.

Since she was in Lane 1, the left-turn only lane, she shifted her attention to maneuvering her vehicle into the Intersection. She did this by means of an "S" movement to get into Lane 2, so as to avoid the sidewalk/curb directly across Lane 1. As she started this process, she began the process of starting to scan for what, by now, would be a third time.

At this point, she was in the Intersection straddling the divider between two lanes in the process of changing lanes. Out of the corner of her eye, she noticed movement. She saw that a white Jeep Cherokee was moving rapidly toward her.

It should be noted that what has been recited above occurred over the time of several seconds. Thus, Grievant testified that when she first saw the Jeep Cherokee, she had moved past Lane 5, and saw the Jeep Cherokee between the two cars at the off-ramp.

Grievant testified she felt that a collision was imminent and jerked her steering wheel to the left to move her vehicle, as much as possible, into a configuration that would be parallel to the Jeep Cherokee.

Grievant testified that she was not able to avoid the collision and the front of the Jeep Cherokee crashed into the passenger door of the patrol car, not as a true "T-bone," but as part of the process of her turning. Grievant testified she slowed somewhat before the collision.

Grievant testified that at the time of collision she was going 15-20 mph. She estimates, based on her experience observing speeding vehicles and practice operating a radar gun, that the Jeep Cherokee was traveling at 50 mph. She estimated that the point of impact in the Intersection was about 60 feet from the corner.

Grievant's Passenger, C___ L___, also testified. She recalled that this was a high priority call with lights justified. She testified Grievant came to a complete or almost complete stop at the Intersection and traffic had pulled over. She remembered seeing nothing coming until halfway through the Intersection when she first saw a flash of white at the corner of her eye, and Grievant veered left. She stated Grievant was "great" in turning the wheel to avoid being hit. Her perception that the Jeep Cherokee was traveling 55 mph was based on the Jeep coming "really fast." No representative of the Employer ever spoke to her about what she saw.

Collision Aftermath

The patrol car violently moved about 44 feet from the point of impact; the passenger door was crimped in; the passenger door window shattered; and the dashboard was buckled. The patrol car came to rest at the beginning of 96th. Grievant then turned to her passenger to make sure she was all right and called for a medical. The passenger's exit from the patrol car was prevented because of the damaged passenger door on one side of her and the mobile data terminal and radio situated in the middle of the front seat.

Both Grievant and her passenger were taken to hospital for treatment. They both suffered back injuries, with 1-2 rib fractures for her passenger. This resulted in several weeks of lost work time for both of them.

The Jeep Cherokee had a brush guard, which to my mind, seems to serve about the same function as a "cow-catcher" on a locomotive. It is set on the manufacturer's bumper. A horizontal cross strut was crimped in. A fender panel between the driver side front wheel and factory bumper showed damage. One witness, who was not at the scene, ascribed the panel damage to the accident [Officer S___]; another, who investigated at the scene, concluded the damage was pre-existing [Sgt. C___].

In sum, photographs of the vehicles show that the energy of the impact was manifested almost entirely in the damage to the patrol car.

Post Collision Events at the Intersection

Fire Bureau personnel extricated Passenger L___ from the patrol car.

Grievant testified she spoke with the driver of the Jeep Cherokee, K___ L___ F___, who stated to Grievant, "Oh, my God, I didn't see you."

Post Collision Traffic Crash Report

The collision was investigated by Sgt. M___ C___, who has been employed by the Employer for 20 1/2 years and has been assigned to Traffic Division for 14 1/2 years. On the day of the collision, Sgt. C___ investigated and then prepared a post-collision report utilizing the Oregon DMV Police Traffic Crash Report form.

He spoke to both drivers at the scene and did scene measurements.

Sgt. C___ recorded on the Report that Ms. F___ had stated to him that her speed was 35 mph prior to collision.⁴ The Report contains Sgt. C___'s record of his conversation at the scene with Grievant.⁵ Attached to the Report is a Portland Police Bureau Traffic Crash Report Diagram form, which form shows the Intersection, it's Lanes, and measurements of the widths of the

⁴ Sgt. C___ recorded F___ as stating: "Said she was N/B down the I-205 off ramp, saw a couple cars stopped N/B left Lane, then her signal turned to green. She continued to go straight in the right lane, as she entered she suddenly saw #2, she tried to stop but couldn't in time. Said she never saw the overhead lights, nor heard the siren."

⁵ Sgt. C___ wrote: "Enroute to a call, her lights and siren were on, she came to a stop facing E/B in the #2 lane. She saw all cars were stopped for her, she pulled into the intersection to continue straight, suddenly saw (#1) coming N/B. She tried to swerve to avoid the collision, but got struck."

Lanes, as described above. His recitation of Ms. F___'s rate of speed is based on his question to her of what her speed was before she started to brake.

He testified the off-ramp is 300-400 feet in length and has a down slope. He measured the skid marks of the Jeep Cherokee; the patrol car had no skid marks. "(S)kid marks to impact" [of the Jeep Cherokee] is measured as "10' 0";" distance after impact [of the police car] is measured as "moved 44' ." ⁶

The Traffic Crash Report records under the heading "Driver Factors,"⁷ that the box for the driver of the Jeep Cherokee has been checked for "failed to yield row." The box "None" is checked under "Driver Factors" for Vehicle 2, the driver of the police car.

Sgt. C___ recalled that Grievant told him that she was traveling 20 mph going through the Intersection.

Sgt. C___ recalled that Grievant stated to him that she came to a stop in Lane 2 [Grievant testified the stop was in Lane 1 and she maneuvered into Lane 2]. There is no evidence that Grievant saw Sgt. C___'s report as he wrote down her comments, so I take this as either a miscommunication between Grievant and Sgt. C___ or his assumption. In either event, I regard this as a collateral matter.

Sgt. C___ testified that the driver of the Jeep Cherokee did not receive a citation because he could not determine "fault" in this collision. He testified he was not aware whether Ms. Fay had allegedly told a firefighter at the scene that she had been traveling at 55 mph.⁸ Sgt. C___ testified to his opinion that the damage to the patrol car was not consistent with the Jeep Cherokee traveling at a rate of 55 mph. He did not ask Grievant how fast the Jeep Cherokee was traveling, nor was he aware that Grievant believed the Jeep Cherokee was traveling at 50 mph.

The After-Action Report

Sgt. Robert H___, a 14 year employee of the Employer, has been a supervisor at East Precinct for 2 years as of the date of the hearing. His responsibilities, as they related to the collision, were to respond to the scene, make certain that traffic division had been notified, gather witnesses, and prepare an After-Action Report for the Precinct Commander.

Sgt. H___ recalled he spoke to Grievant, who told him she was responding to an unknown-whether-injury accident at which drivers were fighting with lights and siren on. At North I-205, she stopped at the red light, saw the Intersection was clear, then saw the Jeep coming, and turned the patrol car to the left.

Sgt. H___ also spoke to S___ P___, a witness to the collision. He recorded her statements in the After-Action Report thusly:

⁶ Sgt. C___ testified that the POI noted on his Report was not accurate due to a problem with a reading he took from a reference point.

⁷ Such factors as "cell phone use," obstructed view, "too fast for conditions" are listed among 17 possible factors, including "none."

⁸ This alleged comment is hearsay. It was received from the standpoint that the Employer may, or may not, have been put on some notice that the 35 mph speed for Ms. F___ was not accurate.

WITNESS STATEMENTS: On 052700 I spoke with Ms. P___ who said she was stopped at the bottom of the I-205 exit ramp in the left lane at a red light. That the first time she saw/heard the police car was when it was directly in front of her in (sic) the intersection and then light for Ms. P___ and Ms. F___ turned green. Ms. P___ said that when she saw the police car it had both its emergency lights and siren on. Ms. P___ said that see(sic) then saw a white Blazer go past Ms. F___ (sic) in the right lane of the exit ramp "pretty fast" and collide with the police car.⁹

The After-Action report records the accident as preventable and states:

RECOMMENDATIONS/CRITIQUE: Officer B___'s response to the unknown if injury accident with drivers fighting using her emergency equipment was appropriate. At the intersection of SE Foster Rd/I-205 NB exit ramp Officer B___ used caution in stopping and checking for cross traffic and saw that it was stopped however,(sic) Officer B___ did not see Ms. F___'s car in the far right lane.¹⁰ Notwithstanding the above Ms. F___ had a green light.

At hearing, Sgt. H___ defined an accident as preventable when the reasonable, trained police officer takes or does not take actions that could have prevented an accident.

He testified that General Orders required that an officer be sure an intersection is clear to proceed safely. An officer has to look at an intersection to see that no hazards are existing, and recognize that there may be hazards that are not seen. In the situation at issue, a hazard came along, and it was obvious to him that when Grievant started across the Intersection there was no hazard at that time.

Sgt. H___ testified that Grievant should have crept slower through the Intersection, and "clear lane by lane" as she proceeded slowly through the Intersection. While Grievant did not expect the Jeep Cherokee, she had to "expect the unexpected." Sgt. H___ testified that Grievant looked twice at the exit ramp, that she was cautious in looking twice, but she had to take responsibility for the hazard. He testified he never asked Ms. Pierce to quantify Ms. F___'s speed, given that Ms. F___'s speed was not relevant and he thus did not take this into consideration when he categorized the accident as preventable.

When Sgt. H___ testified that the Intersection had to be slowly cleared "lane by lane, he used a straight edge so as to illustrate that he viewed the off-ramp as having three lanes, two

⁹ There are some inaccuracies and typos in this paragraph, some which were specifically clarified at hearing, some which were not. The first "(sic)" records Grievant being *in* the Intersection when first seen by Ms. P___. This cannot literally be true given all the other testimony. The sense I give to this is that what was meant by Ms. P___ or Sgt. H___ is that Ms. P___ first observed the patrol car *at the corner of* the Intersection. This would explain how it was that the light for her was red, and then turned green for her, and why she was in one of the fanned out cars which Grievant saw at the off-ramp.

The second "(sic)" is to be construed as a new sentence beginning with a capital "H." The third "(sic)" should be read as Ms. P___, not Ms. F___.

¹⁰ In retrospect, it is unclear to me whether by "far right lane" Sgt. H___ is referring to Lane 5 or Lane 6, and it is also not clear how Sgt. H___ concluded that Ms. F___ was in one particular lane as opposed to the other.

consisting of the formal lanes of the off-ramp, and the third, the space between the two cars. He construed the space, or gap, between the cars as a [de facto] lane, and it was this lane that had not been cleared as Grievant proceeded through the Intersection, although he said the first lane on the right [meaning Lane 5] had been cleared.

The Collision Review Board (CRB) Proceedings

Each officer-involved accident is set up as a CRB file that includes reports, diagrams, and photographs. These are sent to Board members a week before a scheduled meeting. Notice of the meeting is given to officers, and they are invited, but not required, to attend. By the time the officer is invited to speak, the Board has reviewed the file. The CRB's role is to apply consistency in accident review, and weigh all factors.

The CRB, comprised of a quorum of five Board panelists, met with Grievant on June 20.

Two of the voting CRB members testified: Sgt. M__ F____, an officer assigned to East Precinct, and J__ S____r, Fleet Manager Coordinator whose duties include management of the Bureau of Police's assigned fleet.

Sgt. F____ was familiar with the Intersection and the case initially appeared to him as a preventable accident. After discussion, he decided it was non-preventable. His recollection of the incident was that Grievant came to the Intersection with lights on and stopped and cleared the Intersection. Grievant drew a diagram and explained what the vehicles at the off-ramp did, which effectively blocked the lanes of traffic. He testified there is, in theory, a requirement to come to a complete stop for each lane before clearing an intersection. Most officers never come to a full stop, but have a rolling stop, when going through an intersection. His recollection was that the 2 vehicles were at a 45 degree angle, but it was hard to tell how much space would then be available between the 2 vehicles. It was his impression that the Jeep Cherokee was traveling 55 mph, but he could not recall the source of this.

He concluded it was reasonable to proceed through the Intersection under these circumstances and that the accident was non-preventable.

Officer S____ testified that this was not an easy case. There was a lot of discussion, and the majority felt Grievant stopped and cleared properly. While he could not recall how he voted, he testified to a hypothetical that a vehicle traveling at 50-55 mph would forfeit its right of way because it would be traveling too fast for the Intersection, and an accident would be non-preventable.

Responding to another hypothetical, he testified an officer must conduct himself in a certain way, and cannot assume people don't follow the speed limit. If such were the case, an officer could never go through an intersection. State law and Bureau of Police standards allow for "safely" going through an intersection. It is not necessary to come to a complete stop, but one must let the patrol car go almost to a crawl using idle speed and an officer can clear only one direction at a time.

He testified that officers are taught to expect the unexpected, and to expect that civilian drivers may not know where sirens or police cars are coming from. An officer has to assess the situation, depending on a level of acuteness, and hopefully will cross an intersection safely. He did not recall any discussion regarding the Jeep traveling at 55 mph. The discussion he recalled was the position of the vehicle coming down the ramp, that traffic had stopped and yielded, and

the Jeep Cherokee came down the middle of the 2 lanes. He did not recall how far up the ramp Grievant looked, but believed there was testimony regarding this at the proceeding.

He testified that officers are trained, when crossing an intersection against the light, that they are to clear "each lane" of traffic. This is done by approaching an intersection, stopping or slowing, and stopping between 1-2 lanes at a time. An officer becomes a "hazard" once he is in the intersection. This means when an officer clears to a point where the officer thinks it is safe, then the officer should accelerate.

Loss Control Manager P_____ testified that there was a fairly lengthy discussion by the panel with Grievant in the room. Manager P_____ testified the two main issues for the majority was that there existed 2 lanes of traffic and 2 vehicles were stopped. The panel minority believed that, if one is familiar with the Intersection, there are really three lanes of traffic that are available and that all of them had not been cleared.

The CRB Recommendation

By Memorandum dated June 20, the voting majority concluded the collision was "non-preventable" and described its "controverted finding" in the following material respects:

- 3.) Officer B_____ told the board she checked the intersection for cross traffic. She told the board she observed two vehicles on the off ramp from I-205 stopped at SE Foster in a "fan" deployment in the only two lanes of the off ramp.
- 4.) Officer B_____ proceeded into the intersection unaware that another auto had exited I-205 NB and had gone between the two already stopped autos, thus creating a third lane of traffic flow where only two lanes had existed before.
- 5.) It was unreasonable for Officer B_____ to anticipate another auto entering SE Foster from that direction.

Officer B_____, in attempting to avoid the collision, probably lessened the injuries to her BOEC ride-along in the right front passenger seat by turning away from the direction of impact.

In summary, Officer B_____ with overheads and siren activated, stopped, checked for cross traffic, observed two autos stopped filling up the two-lane exit from I-205 before entering the intersection. Officer B_____ cannot be held responsible for the actions of the other driver who essentially created an unlawful third lane of traffic by going in between the two already stopped autos.

Commander R____r's Recommendation for Issuance Of A Letter of Reprimand

Commander Richard R_____, Commander of East Precinct prepared a memorandum and recommendation dated September 29, 2000. After setting forth the findings of the After-Action Report and CRB recommendations, Commander R_____ stated:

I respectfully disagree with the Collision Review Board. This was a preventable accident.

When clearing an intersection, particularly a large intersection, officers must be mindful that conditions can change. In this case, North bound traffic was yielding, but had created an opening through which another vehicle could pass. Consequently, in this case, Officer B_____ should have proceeded cautiously, very slowly, and maintained eye contact with the only "threat" area. I believe it is reasonable to expect someone to pass a vehicle pulled to the curb (in a fan deployment) as if making a right turn. This intersection involves one way traffic. There was no South bound traffic to check. Officer B_____ began accelerating too soon, failed to maintain eye contact at the "threat" location, and although she swerved and minimized the damage and injury, could not avoid the accident.

In this case, I have considered carefully the CRB finding and while I believe Officer B_____ did many things correctly and appreciate her efforts, I do not believe she did everything reasonable to avoid this collision. Consequently, I find this to be a preventable accident.

Based on Officer B_____ 's collision record (this is her second preventable collision) and the seriousness of this collision, I recommend this case be scheduled for Review Level.

Grievant's Testimony Regarding Her Meeting With Precinct Commander R_____

Grievant discovered Commander R_____ 's recommendation while performing light duty at the Precinct. She made a request to meet with him, and they met the following day.

She asked why he had controverted the CRB's finding, explaining she stopped, cleared, and then her vehicle was hit. Commander R_____ informed her that he concluded that she had not come to a stop at the Intersection. She replied that she did come to a complete stop, and that she had to do so, consistent with training. Commander R_____ did not state how he came to his conclusion in this regard. Commander R_____ stated while this might be true, she should have proceeded more slowly.

Commander R_____ said Grievant had been going too fast, and should have maintained eye contact with the only threat, the area of the off-ramp. She replied she did make eye contact by seeing the cars, but she had to maneuver her vehicle in an S and had the responsibility to avoid hitting the curb directly across. Grievant said that it was important to focus on other areas. Commander R_____ said he felt the off-ramp should have been the main focus.

Grievant stated that she did at least something to react by turning her steering wheel to the left, that she wanted to get parallel to the collision, and that, had she not turned, it would have been a true T-bone.¹¹

Commander R___'s Testimony Concerning His Recommendation

Commander R___ testified that he concluded it was reasonable for Grievant to proceed more slowly through the Intersection so as to expect additional cars. He reached his own determination after he reviewed the underlying reports. Commander R___ stated that if one is in a police car, eye contact should be made with every driver to make sure they see you, and then proceed through an intersection.

He testified he did not visit the Intersection, and his conclusion was based on the accuracy of the traffic report and he also relied on Sgt. H___'s After- Action Report. He assumed that he had the CRB recommendation before him, but he could not recall for certain. Normally, he would talk to Grievant before making his recommendation, but he did speak to Grievant before the letter of reprimand went out, and after the Letter of Reprimand was prepared. When he spoke to Grievant he told her that she could convince him otherwise.

The Intersection involves one way streets, and the off-ramp was the location from which Grievant would most likely be struck. Based on the lay out of the Intersection and its large size, it is reasonable to expect a 3rd car to squeeze through at the off-ramp. Grievant told him that she cleared the Intersection by making eye contact with the vehicles that had pulled over, then she shifted her attention to another area, and did not pay more attention to the off-ramp.

Here, Grievant did not make eye contact with the 3rd car because she was not looking at the off ramp, and she began accelerating too soon at what was a one way street. In a conventional intersection, one has to check left, right, and then accelerate. Here, there was only one place for danger because it was reasonable to anticipate a 3rd vehicle to slip through.

He understood, from the After-Action Report, that Grievant entered the Intersection from the middle of the 4 lanes. He did not believe she came to a stop at the Intersection. He concluded that she slowed and made eye contact with the 2 vehicles stopped at their respective curbs at the off-ramp. She then shifted her gaze from the south of the Intersection and then entered the Intersection. She then checked the off ramp a second time, and saw a vehicle coming through the Intersection. Thus, he concluded Grievant checked the Intersection and off-ramp, shifted her gaze away, and, when she looked back at the off-ramp, saw the 3rd vehicle coming at her. He stated he was aware that Grievant would have to watch for pedestrians, and that she should not assume that pedestrians would not cross the street, so she would have to look for this. He understood that Grievant cleared the other areas fairly quickly, and if she spent time making contact with the 2 vehicles, then she should have kept looking at the threat area.

He told Grievant, at a second conversation, that this was the one thing she did wrong.

Since Grievant previously had received a command counseling, even though that counseling was for an incident distinguishable from the one at issue, the accident at issue warranted a Letter of Reprimand. But for the previous command counseling, Grievant would have received a command counseling for the collision at the Intersection.

The Letter of Reprimand

¹¹ This recount covers only the salient points.

By a Memorandum dated October 11, Commander R____ was informed, in material part:

Officer Mary B____...has received a sustained finding for violation of General Order 317.40-Use of Bureau Equipment, of the Manual of Rules and Procedures. The Appropriate level of discipline has been determined to be an Official Letter of Reprimand.

Before this discipline is imposed, you will arrange a meeting with officer Benjamin during which she will be informed of the finding and asked if there is any further mitigation or other facts that should be considered before the discipline becomes a matter of record.

Grievant's Letter of Reprimand is also dated October 11. The Letter begins with a complete recitation of all the provisions of General Order 317.40. It is then followed by what I shall term Explanatory Paragraphs:

On May 26, 2000, you were driving your patrol vehicle eastbound of SE Foster Road responding Code 3 to a traffic accident. You had your overhead lights and siren activated. You stopped at the intersection. You observed two cars yielding the right of way in a "fan deployment". You entered the intersection, but failed to see a vehicle that had exited I-205 and drove between the two cars that were yielding. The vehicle struck your patrol vehicle resulting in injuries to you and the civilian ride-a-long with you. Both vehicles sustained damage.

This is your second preventable accident within a nine month period of time. You have been counseled previously for violation of General Order 317.40.

Disciplinary action, in this instance, will be limited to this Letter of Official Reprimand. ...A copy of this letter will be included in your personnel file.

Training In Operation Of Police Vehicles

Officers Richard S____ and Vince M____ were the Employer's Advanced Academy instructors for the course on police vehicle operation. The parties stipulated Officer M____ would testify as Officer S____ as to certain matters. Unless specifically noted as Officer M____, the bulk of what follows below is Officer S____'s testimony.

Officer M____ stated videos played during training show a police vehicle entering an intersection. A recorder is used to give students a perception of when another driver hears a siren, as opposed to when a vehicle get to the intersection, which is faster than the sound. Drivers need time to react because they listen to the radio or have air conditioning on.¹² The more time one

¹² Sgt. F____ testified the light bar of a patrol car has white, blue, and yellow lights. The front lights of a car come on and light alternately, and the tail lights flash. The colors are designed to be visible for different times of the day. Visibility of the lights and audibility may be obstructed, depending on terrain or other vehicles. Officers are taught to expect that not everyone will see or hear the lights and siren.

gives at an intersection, the more time there is for options. Time and distance are reciprocal notions: as one goes up, the other can go down.

Classroom training includes a review of ORS 801.260, 811.145, 814.050, 820.300, and 820.320. With respect concerning the Statutes' references to "due regard," Officer S_____ stated he taught this as a concept which is slightly different for each situation, inasmuch as factors such as weather, road, light, presence of other people or vehicles, and environmental factors have to be accounted for. He testified that he regarded the "due regard" standard in Oregon Traffic Code Statutes to be the same as the "everything reasonable" standard, and he teaches that they are the same standard. Officer M_____ testified that "due regard" when crossing an intersection encompassed, for him, using lights and giving other drivers time to react.

Officer S_____ stated the environment, including trees and fences, hampers sight lines. This will affect an officer's ability to predict what will happen and will affect handling of the patrol car. A day is spent on doing code runs and mock vehicle pursuits with intersections and a suspect's vehicle set up. He teaches that, when an officer receives a call, he has to: maintain 100% car control; be an active participant in driving; be aware of where other cars are and the appropriate following distances; and gather information regarding the environment and what is in the environment.

Officers are taught how to determine what is to be prioritized and what will make for a dangerous situation, such as pedestrians and other traffic. Discussed also is the fact that a straight of way is less risky than a corner, and the risks of coming to an intersection. Also taught is the concept of "high visual horizon." Usually, while driving, a driver's eyes tell him where to go and prioritize his environment. Some people seem to drive 30-40 feet ahead, but police should look beyond this to scan the environment so it is not a surprise. The road should be scanned for traction so an officer is not surprised by it.

Once an intersection is cleared by all reasonable steps, an officer should go through the intersection. Where an extra wide lane exists, and where one lane has 2 paths of travel, one clears paths of travel because that is where the hazards arise. A path of travel can be a shoulder or a sidewalk; it is about anywhere. If the path of travel is such that you would not reasonably expect someone to travel, then that is to be distinguished from a lane. Also discussed are paths of travel, such as what would be a path of travel if a hazard appears.

A board denoting clear places and obstructions by color is used. Officers are asked to identify the proper path of travel to take. If the officer is at an intersection, and officer has done what is reasonable, the officer would not accelerate unless additional path or lanes can be cleared.

Commentary Regarding the Intersection

Officer S_____ testified that a week before hearing he was shown Sgt. C_____ 's Traffic Report. Based on the diagram in the Report he saw as risks the cross traffic on 96th moving from the right and going to the left.

Approaching the Intersection, Lane 3 should not pose a threat, as compared to Lane 2, whose driver could take the left. He said one is free to assume that the Lane 3 driver would follow traffic laws and not be a threat.

To the left of Lane 1 is a potential threat and the Intersection should be scanned to check for hazards. If one doesn't see anything to the right, one is obligated to look to the right more than once. The number 1 priority at the Intersection are pedestrians. If pedestrians are present, there is

a continuing obligation to look for them. The second priority is traffic coming from the off-ramp. The third priority is enhancing the visual sight line. Assuming an officer started at Lane 1 and the officer went straight, a priority would be negotiating a safe path through the Intersection. When driving through an intersection, an officer should keep scanning. The speed required to clear the Intersection here would be 2-3 mph or creeping, using the car's idle to move forward.

An officer cannot travel faster than a hazard can appear. He stated there was danger at Lanes 5-6 of the off-ramp. Sight lines dictate what one's vision is. One has to move forward slightly to enhance one's sight line, and environment dictates how one does that. It is necessary to create a sight angle so that one can go through clearing lane by lane. By "lane by lane," he means each lane of road, which is an easy gauge. Also, there can be paths where there is a lane, and, if a car can come through, that lane needs to be checked. This may require a creep or a stop, but one should be able to look all the way down a lane to distinguish a hazard. He has crossed intersections using a Code Red and he will not go through without clearing every single lane, and will take his time and maybe spend 5-6 seconds clearing an intersection.

POSITIONS OF THE PARTIES

The Union submits:

(1) By applying different legal standards at various stages of its investigation, the Employer failed to provide due process to the Grievant:

(a) Sergeant H____'s After-Action Report applied a strict liability standard; the CRB applied an "everything reasonable" standard; Commander R____ applied an indistinct standard; and Chief _____ applied a negligence standard.

(b) The Employer has failed to communicate clear standards of performance.

(c) Consequently, the appropriate standard to be utilized by the Arbitrator is that of negligence, and Grievant's actions were reasonable, not negligent.

(2) The Employer's conclusions were predicated on fundamental mistakes of fact:

(a) The Jeep Cherokee was in fact traveling at such a high rate of speed that the collision was inevitable.

(b) Commander R____'s expectations to the effect that Grievant should have proceeded slowly while at the same time maintaining her gaze at the off-ramp were unreasonable in light of the Bureau's training concerning how to clear an intersection.

The Employer submits:

(1) The Grievant failed to do "everything reasonable" to avoid the collision:

(a) The remaining gap between the two fanned out cars at the off-ramp constituted a hazardous condition.

(b) There was a failure to progress at a sufficiently slow rate of speed.

(c) The traffic conditions, taken as a whole, required that the Grievant be more mindful when crossing the Intersection:

(2) The Grievant violated Bureau policy by failing to exercise due regard under GO 317.40 when she:

(a) Failed to adhere to the "lane by lane" clearing procedure.

(b) Failed to operate the vehicle in a safe and lawful manner under the circumstances.

(c) "Negligently" failed to operate the vehicle in a "reasonably safe and prudent" manner.

(3) The discipline was appropriate given it was the lowest possible discipline and in light of Grievant's record.

OPINION

Prefatory Comments

The Employer contends that GO 317.40 is broad enough to capture three different concepts. The first is "negligence," and whatever else may be implicated by that word as it is generally used. The second concept is that of "everything reasonable." The third concept is that of "due regard" as reflected by Statute and in Employer policy.

The Union contends that the Employer position is the product of shifting and imprecise standards, most of which are unsupportable and unfair to Grievant, and that GO 317.40 is solely limited to "negligence." The Union argues that, when this standard is used, Grievant has not been negligent, and, consequently, the discipline was not for just cause.

I begin with a discussion of the three concepts offered by the Employer.

Due Regard

The Employer's policy directive at 630.10(a) mirrors Oregon Vehicle Code language at ORS 820.300(2) ["(a) Does not relieve the driver of an emergency vehicle or ambulance from the duty to drive with due regard for the safety of all other persons; (b) Are not a defense to the driver of an emergency vehicle or ambulance in an action brought for criminal negligence or reckless conduct.

It would seem reasonable that the Employer intended to give the same meaning to "due regard" in its directives as in Oregon's vehicle laws-- whatever that may be. One therefore cannot

interpret the directives without interpreting the Statute. However, I conclude that to do so is nonessential for this issues to be resolved in this controversy.

On brief, the Union notes that its research was unsuccessful in discovering any cases dealing with the Oregon vehicle law. I would speculate that the Employer's search results were the same because the Employer provides the Black's Law Dictionary definition of due regard, that of "consideration in a degree appropriate to demands of the particular case." The Employer then makes a connection of the dictionary definition to that term of negligence law known as "standard of care."

Although "criminal negligence" and "reckless conduct" are specifically found in the Vehicle Code, there is for me a curious absence of the specific terms "negligence" or "standard of care." It would seem arguable that the Legislature intended to include standard negligence as a cause of action, particularly as it related to "due regard," it would have specifically done so. The legislative intent is thus unclear to me. Carl Llewellyn was the author of a celebrated article in 3 Vanderbilt L. Rev. 395 (1950) titled *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed*. Llewellyn, parenthetically, posited 28 of these canons. Suffice it to say that this is a complex area.

Consequently, I am not inclined to venture easily into deciphering a Statute in order to decipher certain Employer directives, when all of this should be taken as merely a backdrop to the specific issues for which the witnesses showed concern in their testimony.

The Statutes and Employer directives provide some sense of the police environment, and I have used them that way. I do not attach any independent significance to them as a measure of Grievant's conduct.

I am mindful that Officer S_____ responded to Employer questions at hearing concerning the substance of the Police Vehicle Operation course. He stated his personal interpretation that "due regard" was the same as the "everything reasonable" standard. That is quite prudent in terms of conveying performance standards to trainees, but I have reservations that the State of Oregon Legislature had the National Traffic Safety Board's "everything reasonable" standard in mind when drafting its Statute.

The Employer's witnesses themselves did not raise the "due regard" concept as informing their views and the trail of documents never raises the concept of "due regard. Rather, the contravention of GO 317.40 and preventability of the accident were solely put at issue.

Accordingly, I will make no findings concerning the implications of "due regard," one way or another.

Negligence

Contrary to "due regard," negligence is a concept found in common law as is used as a common term of speech.

A currently favored treatise on the subject of tort law is that of Don B. Dobbs, *The Law of Torts* (2001). Dobbs notes there are two meanings to the term: "negligence as risky conduct, e.g. driving a car at a high speed; and negligence as a type of case, e.g. referring to a legal claim or cause of action.

I have selected parts of two sections:

Sec. 114

Elements of the Prima Facie Case for Negligence:

- (1) The defendant owed the plaintiff a duty of care, for instance, not to engage in unreasonably risky conduct;
- (2) The defendant breached that duty by his unreasonably risky conduct;
- (3) The defendant's conduct in fact caused harm to the plaintiff;
- (4) The defendant's conduct was not only a cause of the plaintiff's harm but also a proximate cause, meaning that the defendant's conduct is perceived to have a significant relationship to the harm suffered by the plaintiff;
- (5) The existence and amount of damages, based on actual harm of a legally recognized kind such as physical injury to person or property.

Sec. 115

The Elements: Meaning and Terminology

- (1) Negligence as risk. The defendant must have breached his duty of care to the plaintiff. When the defendant owed a duty of reasonable care, the defendant breaches that duty by conduct that is unreasonably risky. Juries, not judge, decide whether the defendant was negligent unless the question is too clear to permit different evaluations by reasonable people.
- (2) Negligence as breach of duty. Sometimes jurists define negligence as a breach of the duty of care. In this situation, you are not negligent, or at least not actionably negligent, if you were under no duty of care, no matter how unreasonably risky your conduct might be. At other times, lawyers and judges use the term negligence to mean unreasonably risky conduct, regardless of whether the defendant is under a duty of care. ...

I take the Union's point on brief that negligence may be evaluated in light of the definition of duty of care in Oregon's Uniform Civil Jury Instructions (UCJI)[... "reasonably careful would not do, or fail to do..."] which I conclude is congruent with GO 317.40's references ["reasonably and careful person," "person of ordinary prudence"]. Whether negligence as risk or actionable negligence are implicated, under this definition the behavior of others, other than the main actor, come into play. UCJI 20.06 (Right To Assume Law Obeyed).

The "Everything Reasonable" Standard

Unlike "negligence," the record shows no formalized definition of what is implicated by this terminology. This leaves it to the Arbitrator to attempt some definition in order to make this Opinion more understandable.

The phrasing "everything reasonable" appeared in two contexts. The first of these was in the uniform way in which witnesses expressed themselves. In this first context, witnesses used the phrase as a kind of shorthand. The phrase would first be utilized as a standard of measurement. Then the witness would offer an example of behavior that the witness would state was "reasonable" or not.

The second context is that found in 640.52's statement that the "CRB's recommendation for finding will be based on criteria established by the National Traffic Safety Council (i.e., did the driver do everything reasonable to avoid the collision?). Given that "i.e." has the meaning "that is," I take it that 640.52 intends that "everything reasonable" is really to be taken as the only the only single criterion, despite any prior reference to NTSC "criteria" in the plural. This may

explain why no witness offered an explanation of what NTSC "criteria" might be, only that a particular circumstance was within the ambit of that which is "reasonable" or not.

Based on my understanding of the witnesses' testimony and the documents in the record, "everything reasonable" is a kind of defensive driving undertaken by a uniquely trained police officer. It is, as I understood Sgt. H_____ to testify, the expectations required of and behavior expected from the uniquely trained and experienced police officer [in the abstract, conceptual sense].

Consequently, when 640.52 defines a preventable accident as one wherein a "driver [has] failed to recognize a hazardous condition or circumstance and...", I presuppose that it is what the reasonable, trained police officer would be expected to identify as a hazard. Of course, the second part of this sentence, starting with the conjunctive "and" must also be met before an accident can be concluded to be preventable.

Issues To Be Decided

In general, the Employer has the burden to establish that Grievant engaged in conduct in violation of rules of conduct or performance. Since there have been no contentions otherwise, GO 317.40 is a reasonable and lawful rule, the breach of which might be expected to result in discipline. The Employer is then expected to show that the discipline imposed under this type of rules violation was for just cause.

There are only two standards under which it can do so. By a preponderance of the evidence, the Employer must establish either that the Grievant has engaged in negligent conduct as defined in GO 317.40, or that the Grievant has engaged in an otherwise "preventable" accident the circumstances of which independently violate GO 317.40.

Additionally, the Union has raised several due process issues which, it argues, precludes a finding the Grievant received a Letter of Warning for just cause.

The Due Process Issues Raised by the Letter of Reprimand

The Union argues on brief that the Grievant was not accorded procedural due process because she did not have an opportunity to be heard by the actual decision-maker before discipline was imposed. In this case, the Union contends that decision-maker is the Chief.

The traditional elements of due process for private sector cases include: (1) timely action by the employer; (2) a fair investigation; (3) a precise statement of the charges; (4) a chance for the employee to explain before imposition of discipline; and, (5) no double jeopardy. Having said this, there are arbitrators who focus on whether under factor (4), above, the right to be heard is procedurally mandated. They hold--in the absence of prejudice--that an employer does not commit a due process violation by the failure, without more, to give a grievant some chance to explain his side of the story.

On the other hand, to my mind, employer investigations in the public sector tend to meet inherently meet due process by virtue of the fact that the public sector is more procedurally regulated by statute, case law, and employer regulations.

Here, the Employer has a long-standing system of accident investigation that includes the opportunity for officer participation before a review panel, one existing to provide the Employer

with consistency in accident assessment. The Grievant herein was advised by the CRB that the CRB's recommendation might be used for purposes of discipline. This, in particular, is certainly a process where a grievant can be heard.

The Precinct Commander considered the underlying reports and recommendations. The system does not provide, insofar as I can see, the requirement that a grievant speak directly to the Chief or his agent before the Precinct Commander's recommendation is made. Rather, an agent of the Chief, in this instance the Precinct Commander is charged with the responsibility to meet with an officer only after an apparently revocable decision for discipline is reached [See October 11, 2000 memorandum to Commander R____ [...]"Before this discipline is imposed, you will arrange a meeting with Officer B____ during which she will be informed of the finding and asked if there is any further mitigation or other facts that should be considered before the discipline becomes a matter of record...."]

Grievant did speak to the Precinct Commander before his recommendation was sent. Theoretically, even absent this, while a Letter of Reprimand had been prepared by this meeting, the decision to issue the Letter of Reprimand is not foreordained.

Taken as a whole, and in the absence of express statutory or other regulation, Grievant was provided with procedural due process.

On brief, the Union argues that the "disciplinary letter to ...(Grievant)...contains absolutely no indication of why he (the Chief) believed ...(Grievant)...violated the Bureau's rules." I will leave for discussion below the implications of what I have earlier called above the Explanatory Paragraphs.

Grievant Was Not Negligent

General Order 317.40, insofar as the Letter of Reprimand actually recites, employs the concept of negligence in its first and last paragraphs. The first, "Members shall utilize Bureau Equipment and property...and shall not negligently or purposely abuse...Bureau equipment," deals with "use" of "equipment." Contrary to the Employer on brief, I do not construe this paragraph as pertaining to motor vehicles. This is because there is an independent and final paragraph to the GO, also cited by the Employer, pertaining specifically to officers "who have accidents attributable to their negligent operation of Bureau vehicles...". Were the first paragraph intended to include motor vehicles, as opposed to equipment issued to officers, the specific later reference to motor vehicles would be redundant. [There is a third paragraph at issue, one seemingly not raising negligence. At this point, I am concerned with the references in the GO to negligence.] I conclude, contrary to the Employer, that the first paragraph is not relevant to assessing Grievant's conduct.

"Negligent operation" is defined in the last paragraph of the GO in terms of what the reasonably prudent and careful person would or would not be expected to do under similar circumstances. In reviewing the briefs, there appears to be an issue concerning whether the reasonable, prudent person of the GO should be read to mean the same reasonable, trained police officer which, I have concluded, informs the CRB's deliberations. I interpret these as two independent concepts applied to two different sets of circumstances. Thus, while negligence may always mean that an accident can be categorized as preventable, the opposite is not true. Accidents can be found to preventable by the CRB, but still not the result in a finding of negligence as defined in the GO.

To conclude otherwise would render all the witnesses' testimony relating to "expecting the unexpected" entirely senseless. The unexpected is quite beyond what the reasonably prudent person would rationally expect. Therefore, Grievant's purported negligent conduct will be assessed under that reasonable, prudent standard as defined in the GO. Under this negligence standard, the behavior of the driver of the Jeep Cherokee comes into issue.

I have taken some effort to recount Grievant's step by step process when attempting to cross the Intersection. I did this so that it can be compared with that of Officer S____. Up to the point Grievant began to cross the Intersection, I conclude that her assessment of the priorities to be given to environmental factors and the manner in which she scanned the Intersection [twice] would seem to be "textbook" under my review of Officer S____'s testimony. Grievant's instinctive reactions, by which she attempted to minimize the effects of the impending collision, were also consistent with her training.

The behavior of the Jeep Cherokee driver therefore must be addressed. As the Union argues on brief and at hearing, the reasonable prudent person can expect that others will follow the law. There is no question that Grievant, saw the cars fanned out at the end of the off-ramp in a manner that appeared to conform with giving Grievant the right of way under Oregon's Vehicle Code. Despite the traffic light being green for them, she concluded there would be no further movement from that area.

I conclude that, in order for the collision to have occurred the way it did, the driver of the Jeep Cherokee must have been engaged in some risky conduct. First, there was no Employer witness who showed any doubt when Grievant stated that the Jeep Cherokee was not adjacent to the fanned cars when Grievant looked. Second, in order to proceed into the Intersection, the Jeep Cherokee would have had to come between the two cars that were blocking a good part of the two lanes of the off-ramp. Third, the Jeep Cherokee was likely traveling faster than 35 mph [I may assume too much by thinking that the driver of the Jeep Cherokee would have received a speeding citation if she admitted to exceeding the speed limit.]

Staying with this last point, the Employer made an observation on brief that the driver of the Jeep Cherokee would not have reasonably be expected to enter the Intersection had that driver heard the siren or seen the flashing lights of the patrol car. This applies to Grievant whose knowledge of procedure gives every indication she would not have entered the Intersection had there been a moving vehicle proximate to the two curbed cars.

There was a great deal of testimony at hearing concerning whether the damage to the patrol car was consistent with the Jeep Cherokee traveling 35 mph, 50 mph, or 55 mph. All I can conclude is that there are too many variables which preclude making a definitive determination of speed based on damage to vehicles. This is why I qualify the speed as being "more than" 35 mph. Officer Sm____, whom the Employer advanced as an accident reconstruction expert, included in his testimony an interesting calculation based on a diagram of the Intersection.

Officer Sm____ roughly calculated the distance traveled by Grievant from the corner of the Intersection [I say corner because it is unclear whether it was from Lane 2, or he made allowance for the "S" maneuver from Lane 1] to the point of impact-- traveling at a rate of 20 mph. He then calculated the distance traveled by the Jeep Cherokee *from the point of impact back* to the off-ramp based on a speed of 35 mph. In doing this, the Jeep Cherokee would have been at a point proximate to the curbed cars at the same moment that Grievant began to cross the Intersection. However, the Employer witnesses have never disputed the Grievant that the Jeep Cherokee was not proximate to the curbed cars. Officer Sm____'s calculations demonstrate that the

Jeep Cherokee was traveling faster than 35 mph, and was at a point farther up the off-ramp where it was not visible to Grievant in proximity to other cars. As the Union calculated on brief, the Jeep Cherokee could be assumed, thus, to be traveling substantially faster than 35 mph.

I conclude that, based on all the above, the reasonable prudent person would not have anticipated another driver moving at a substantial rate of speed and to create an "unlawful third lane" of traffic between two curbed and fanned out cars. As it relates to "accidents arising from the operation of a Bureau vehicle," Grievant's conduct do not rise to the level of negligence defined in the GO.

Grievant Failed To Do "Everything Reasonable" To Avoid A Preventable Collision

Officer S ____ utilized the terms "lanes" and "paths" when describing hazards presented at intersections. Understood this way, a police officer has a path of travel, as Grievant had when she had to move from Lane 1 to Lane 2. Others--pedestrians, bicyclists, and, perhaps at times, drivers of other vehicles--can also take paths. The witnesses' references to "clearing lane by lane" and the space at the off ramp as being a "lane," or a third lane, only invites a needless debate. Lanes can be taken as such in the literal sense, but, in training, the word also includes the concept of "paths." Sgt. H ____ and Commander R ____ each had different approaches to taking into account the hazard posed by the gap. I do not regard these approaches as inconsistent; rather, they are illustrative.

Where paths become at issue, the focus is directed solely to the police officer's driving reactions and perceptions. Thus, the behavior of other drivers is not a mitigating factor. Instead, other drivers become an environmental factor akin to the layout of an intersection.

The Employer's witnesses at hearing consistently regarded the gap between the curbed cars at the off-ramp as a hazard, notwithstanding the remoteness that a driver might use the gap as a path of travel. This approach is similar to that taken by Grievant, in my opinion, when she first looked left at the corner of the Intersection for cars traveling the wrong way on a one-way street. It is similar to Officer S ____'s testimony to the effect that where it is apparent that pedestrians are present, there is a *continuing* obligation to monitor their activities. The focus is on the very presence, without more, of a potential path, and not, as in negligence, the reasonable probability that another actor will or will not take predicable or rational action.

Identification of potential hazards is undertaken to account for this unpredictability. In this regard, the CRB's findings made no reference to the speed of the Jeep Cherokee. The focus was entirely on as assessment of the concept of lane or path ["...the other driver who essentially created an unlawful third lane of traffic by going in between the two already stopped autos."]

Commander R ____'s recommendation is the single document in the record that places all the foregoing in perspective, particularly when it emphasizes that it is but a single instance of hazard identification that is at issue, and not the overall performance of Grievant at the Intersection. Based on the recitations of Commander R ____'s recommendation, the Employer has established that the collision was preventable under the Employer's standards

The Recitations Of The Letter Of Warning

Commander R____'s recommendation does not specify what rule of discipline or standard of performance Grievant has breached or otherwise failed to meet.

On brief, the Employer takes the approach that the "everything reasonable" analysis of Commander R____ is not inconsistent with General Order 317.40. Thus, it follows that the Letter of Reprimand is appropriate to the Grievant's situation. To the contrary, I see no apparent linkage between the recitations of Commander R____'s recommendation and the Explanatory Paragraphs. I appreciate that there exists standard language, which I will term "boilerplate," in letters of discipline issued by the Employer. There are indeed some aspects of the boilerplate recitation of the GO that, parsed out as the Employer did on brief, would be amenable to the view that a preventable accident, without more, may result in disciplinary action:

Members will operate bureau vehicles in a manner that will, with regard to weather, equipment and tactical consideration, result in safe and lawful operation.

But that does not explain the Explanatory Paragraph. The language therein may be inadvertent, or it may be intentional.

Sgt. H____ was clear in his testimony that he critiqued Grievant on the basis of hazard recognition. His After-Action Report, on the other hand, is not so clear, and states matters that might just as easily be construed as bearing on negligence. Compare: "Officer B____ did not see Ms. F____'s car in the far right lane. ...," with Explanatory Paragraphs' "...You entered the intersection, but failed to see a vehicle that had exited I-205 and drove between the two cars that were yielding."

It seems clear that the Jeep Cherokee was never proximate to the two curbed cars in a position to be seen at the second scan. The Explanatory Paragraph can be read to suggest that Grievant never looked in the first place, something that no witness testified happened.

The Explanatory Paragraph states: "The vehicle struck your patrol vehicle resulting in injuries to you and the civilian ride-a-long with you. Both vehicles sustained damage." This has nothing to do with hazard recognition. The emphasis on injury and damage is what comes with a discussion of negligent conduct, not defensive driving techniques.

I compare the Explanatory Paragraphs with the language of Grievant's previous Command Counseling. That language gives a clear representation of what occurred: "PC exiting sallyport and misjudged distance hitting a support pole." I have an idea from this what was involved in that particular Command Counseling: the simple misjudgment of a spatial relationship. As Commander R____ testified, the failure to recognize a path or lane posing a potential hazard is on the same level as that of a Command Counseling. But for the existence of the Command Counseling, the events giving rise to this proceeding would not have resulted in a Letter of Reprimand.

The Explanatory Paragraph provides no equivalent perspective and is misleading.

This Reprimand could be viewed as a harsh result for someone such as Grievant who "did many things correctly." I would not substitute my judgement for the Employer's where, as here, Commander R____'s recommendation was devoid of arbitrariness, bad faith or

discrimination. But I have a lingering concern that the Employer, on review, relied on matters which Commander R_____ found irrelevant.

My concern is that the Letter is the first of the steps of the contractual progressive discipline procedure and is part of Greivant's personnel file. The next step is suspension, which is quite a serious discipline in my estimation. To be fair to Grievant, her record should give a fair representation of what the Employer finds deserving of a Reprimand.

If the basis of the Letter of Reprimand is not identical to Commander R_____ 's rationale, then the only basis left is that of negligence. The Reprimand, in that circumstance, was therefore not issued for just cause, and this grievance should be sustained. If the Letter of Reprimand was issued for the reasons stated by Commander R_____, the Employer should be directed to so state. I regard this as within the Arbitrator's authority under the Agreement, inasmuch as the Arbitrator is not formulating language. The language already exists in Commander R_____ 's recommendation.

Therefore, this Opinion and Award should be considered to be an interim Opinion and Conditional Award, subject to the Employer clarifying its intent in the Letter of Reprimand by means of the undertakings I have set forth below.

CONDITIONAL AWARD

Accordingly:

1. The grievance is conditionally denied subject to the Employer amending and re-issuing the Letter of Reprimand by:

(a) Deleting the present Explanatory Paragraphs and substituted in its place the language: "See attached recommendation of R_____."

(b) Appending to the re-issued Letter of Reprimand Commander R_____ September 29, 2000 memorandum.

2. As a pragmatic alternative, the parties may, of course, mutually agree to language other than the language set forth in paragraph 1 above.

3. Consistent with the stipulation of the parties, the Arbitrator will retain jurisdiction for purposes of resolving issues bearing on implementation or interpretation of this Opinion and Conditional Award. Notice should be provided to the Arbitrator within 30 days whether the Letter of Reprimand has been re-issued in the manner described at paragraphs 1 or 2 above. Receipt of this Notice by the Arbitrator shall be construed by the Arbitrator and the parties as signifying that the Conditional Award has become the Final Award without necessity for any further action on the part of the Arbitrator or parties.

4. Should the Employer choose not to exercise either of the options provided in Paragraphs 1 or 2, within

30 days of receipt of this Opinion and Conditional Award, the parties shall provide argument to the Arbitrator concerning why a Final Award sustaining the Grievance, with appropriate remedy, should not issue.

DATED at Oakland, California this 12th day of December 2002.

Charles H. Pernal, Jr., Arbitrator